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No. 679

In the Supreme Court of the United States

OCTOBER TERM, A.D. 1968

In The Matter of **NATHAN SHAVIN**, An Attorney

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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In the Supreme Court of the United States

OCTOBER TERM, A.D. 1968

No.

In The Matter of NATHAN SHAVIN, An Attorney

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Nathan Shavin, petitioner herein, prays that a writ of certiorari be issued to review the decision of the Supreme Court of Illinois.

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Illinois (R. 17) is reproduced in Appendix I to this Petition for Certiorari. The opinion is published in the North Eastern Reporter, *In re Shavin*, 239 N.E.2nd 790.

JURISDICTION

The decision of the Supreme Court of Illinois was rendered on May 29, 1968 (R. 18). On June 19, 1968, an order was entered by the Supreme Court of Illinois on motion and stipulation granting an extension to July 19, 1968, to file a petition for rehearing. (R. 20). This petition for rehearing was filed on July 17, 1968 (R. 21) and the petition for rehearing was denied by the Supreme Court of Illinois on September 24, 1968. (R. 22)

The jurisdiction of the Supreme Court of the United States is invoked herein under Title 28 United States Code, Section 1257(3).

QUESTIONS PRESENTED

(1) Is the double jeopardy clause of the Fifth Amendment to the Constitution of the United States applicable to the States through the Fourteenth Amendment?

(2) May a State, without hearing evidence as to guilt or innocence, suspend a lawyer from the practice of law, after more than 40 years of practice, for the sole reason that he served a sentence for a Federal income tax violation?

(3) Does the additional punishment of a two-year suspension from the practice of law in the case at bar constitute double jeopardy which is prohibited by the Fifth Amendment to the Constitution of the United States?

In this connection, we call this Honorable Court's attention to the case of *Benton* v. *Maryland,* No. 1185, Misc., October Term 1967, now pending before this court, wherein this court, on June 17, 1968, entered the following order (392 U.S. 925):

"Motion for leave to proceed in forma pauperis and petition for writ of certiorari to the Court of Special Appeals of Maryland granted limited to the following questions:

"(1) Is the double jeopardy clause of the Fifth Amendment applicable to the States through the Fourteenth Amendment?

"(2) If so, was the petitioner 'twice put in jeopardy' in this case? Case transferred to the appellate docket."

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

The Fourteenth Amendment to the Constitution of the United States provides "nor shall any state deprive any person or life, liberty or property, without due process of law."

STATEMENT OF THE CASE

The Supreme Court of Illinois in its opinion, has stated the facts in the case at bar as follows (R. 17):

"The sole question presented in this disciplinary proceeding is the extent of the punishment to be imposed upon respondent [petitioner herein], Nathan Shavin, an attorney practicing in Chicago since 1926. Respondent [petitioner herein] was convicted in 1961 of knowingly filing false and fraudulent personal income tax returns for the years 1954 and 1955 in violation of section 7201 of Title 26 of the United States Code, and concurrent sentences of 18 months imprisonment were imposed on each of two counts together with fines totalling $5,000 and costs of $1,420.94. The conviction was affirmed in 1963 (*United States* v.

Shavin, (7th Cir.) 320 F.2d 308), and respondent [petitioner herein] served 12 months in the Federal penitentiary; the fines and costs were paid.

* * *

"The stipulated or admitted facts indicate respondent's [petitioner herein] practice consisted almost entirely of personal injury work for plaintiffs . . . *Very loose bookkeeping methods prevailed, and* while the amount of unreported income for the years in question was alleged by the government to be $28,104.50 and $61,063.01, *it is stipulated that there were deductible items paid out during those years which were not included in the returns. The actual amount of unreported income is claimed to be substantially less than that charged; it is as yet undetermined and the subject matter of a suit presently pending in the United States Tax Court. A number of lawyers and a judge testified that respondent's* [*petitioner herein*] *reputation for integrity and honesty was good, and it is not contended that any client was dissatisfied with the manner in which a case was handled.* Respondent [petitioner herein] underwent surgery in 1966 and subsequently suffered a heart attack necessitating some hospitalization and a period of convalescence.

"Also urged in mitigation is respondent's [petitioner herein] claim that settlement checks received from insurance companies approximately *$30,000 during each of the questioned years were never deposited or cashed by him despite the fact that respondent's* [*petitioner herein*] *normal practice was to pay from his personal funds the amount due the client, secure the client's signature upon release form and then present the signed release to the insurer in exchange for the settlement check which respondent* [*petitioner herein*] *would then endorse and deposit or cash.* . . . While seemingly well-nigh incredible, *it is stipulated that these settlement checks were apparently uncashed and undeposited.*" (Emphasis supplied)

In the State of Illinois, the Supreme Court of the State is the sole, exclusive, one and only court which has jurisdiction to license, censure, suspend or disbar lawyers. *In re Day,* 181 Ill. 73 (1899); *In the Matter of Frank,* 293 Ill. 263 (1920); *In re Anastaplo,* 3 Ill.2d 471 (1954); *In re Latimer,* 11 Ill.2d 327 (1957); *In re Anastaplo,* 18 Ill.2d 182 (1960); *In re McCallum,* 391 Ill. 400 (1945); *In re Crane,* 23 Ill.2d 398 (1961); *In re Browning,* 23 Ill.2d 483 (1962). See also *In re Summers,* 325 U.S. 561 (1945), and *In re Anastaplo,* 366 U.S. 82 (1961), where the Supreme Court of the United States reviewed rulings of the Supreme Court of Illinois in refusing applications for admission to practice law in the State of Illinois.

The constitutional issue of double jeopardy, herein involved, was raised by the petitioner in the Supreme Court of Illinois (a court of "first instance" and also a court of "last resort," as this is the only tribunal available in the State of Illinois for this proceeding) by a Petition for Rehearing (R. 21), which is reproduced in Appendix III to this Petition for Certiorari. The Supreme Court of Illinois denied the Petition for Rehearing on September 24, 1968, without opinion (R. 22).

REASONS FOR ALLOWANCE OF WRIT

THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PROHIBITING DOUBLE JEOPARDY.

I.

FEDERAL BILL OF RIGHTS IN CRIMINAL CASES

The Fourth, Fifth, Sixth and Eighth Amendments to the Constitution of the United States guarantee procedural due proceess in criminal cases. The Supreme Court of the United States has established, through a long series of decisions rendered in recent years, that the protection of these Amendments is not limited to proceeding in the Federal Court only—as had been previously held—but applies also to prosecution of criminal cases in state courts, as shown by the following:

Fourth Amendment: search and seizure, *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Marcus* v. *Search Warrants*, 367 U.S. 717 (1961); *Berger* v. *New York*, 338 U.S. 41 (1967); *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Sibron* v. *New York*, 392 U.S. 40 (1968).

Fifth Amendment: self incrimination, *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Gardner* v. *Brodereick*, 392 U.S. 273 (1968); *Sanitation Men* v. *Sanitation Com.*, 392 U.S. 280 (1968).

Sixth Amendment: assistance of counsel, *Gideon* v. *Wainwright*, 372 U.S. 355 (1963); *Douglas* v. *California*, 372 U.S. 353 (1963); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964);

Miranda v. *Arizona*, 384 U.S. 436 (1966); *Milani* v. *Illinois*, 386 U.S. 12 (1967); *Swenson* v. *Bosler*, 386 U.S. 258 (1967); *Anders* v. *California*, 386 U.S. 738 (1967); *Entsminger* v. *Iowa*, 386 U.S. 748 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967); *Hemphill* v. *Illinois*, 388 U.S. 465 (1967); *Mempa* v. *Rhay*, 389 U.S. 128 (1967); speedy trial, *Klopfer* v. *North Carolina*, 385 U.S. 213 (1967); compulsory process for obtaining witnesses, *Washington* v. *Texas*, 388 U.S. 14 (1967); confrontation with witnesses, *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Douglas* v. *Alabama*, 380 U.S. 415 (1965); *Smith* v. *Illinois*, 390 U.S. 129 (1968); *Barber* v. *Page*, 390 U.S. 719 (1968); *Roberts* v. *Russell*, 392 U.S. 293 (1968); trial by jury in criminal cases which do not fall within the category of "petty" offenses, *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Bloom* v. *Illinois*, 391 U.S. 194 (1968); *Dyke* v. *Taylor Implement Co.*, 391 U.S. 216 (1968); trial by an "impartial jury," *Parker* v. *Gladden*, 385 U.S. 363 (1966); *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968).

Eighth Amendment: cruel and unusual punishment, *Robinson* v. *California*, 370 U.S. 660 (1962).

At this far advanced developmental stage of the law, no reason seems to exist why the double jeopardy provision of the Fifth Amendment should not (like all the other provisions of the Fifth Amendment) be applicable to the States.

Recently, the Supreme Court of the United States rendered a number of important decisions which must awaken the legal profession to the realization that the differencee between "civil" and "criminal" cannot rest on arbitrary labeling by courts and legislatures, but requires careful examination of legal consequences to distinguish reality from fiction. The Supreme Court of the United States made it clear that a "State cannot foreclose the exercise of constitutional rights by mere labels." *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 429 (1963).

II.

PROCEEDINGS FORMERLY "CIVIL" ARE NOW "CRIMINAL"

1. *Juvenile Delinquency*

A proceeding against a juvenile delinquent was held by the Arizona state court to be "civil." But, in the case of *In re Gault,* 387 U.S. 1 (1967), the Supreme Court of the United States reversed the Arizona decision and held that it was a "criminal case" protected by the Federal Constitution. The Court pointed out that "proceedings to determine 'deliquency', which may lead to commitment to a state institution must be regarded as 'criminal' for purposes of the" federal constitutional guarantees (387 U.S. at 49). The Court accented that "commitment is a deprivation of liberty. It is incarceration against one's will." (387 U.S. at 50).

In the case of *In re Whittington,* 391 U.S. 341 (1968), the Supreme Court said at page 344: "In *Gault,* this Court held squarely, for the first time, that various of the federal constitutional guaranteees accompanying ordinary criminal proceedings were applicable to state juvenile court proceedings where possible commitment to a state institution was involved. * * * The judgment is vacated and the case is remanded to the Ohio Court of Appeals of Fairfield County for consideration in light of *In re Gault,* 387 U.S. 1 (1967)."

2. *Sex Offenses*

A proceeding under the Colorado Sex Offenders Act was treated by the Colorado State Court as a "civil" proceeding In *Specht* v. *Patterson,* 386 U.S. 605 (1967), the Supreme Court of the United States reversed the Supreme Court of Colorado and held that a proceeding against a

person with sexually aggressive tendencies is a "criminal case" protected by the Federal Constitution, as the deprivation of liberty by confinement "is criminal punishment even though it is to keep individuals from inflicting future harm". (386 U.S. at 608-609).

3. *Revocation of Probation*

Prior to 1967, a proceeding for the revocation of probation was held to be "civil". In *Mempa* v. *Rhay,* 389 U.S. 128, decided on November 13, 1967, the Supreme Court of the United States held that, in a proceeding to revoke probation, the defendant has a right to assistance of counsel under the Sixth Amendment to the Constitution of the United States. Thus, the Supreme Court determined that revocation of probation is a "criminal", not a "civil", proceeding.

4. *Forfeiture Proceeding*

Prior to 1965, a proceeding for the forfeiture, destruction, disposition or recovery of property seized or confiscated as contraband was considered as "civil". In *Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693 (1965), the Supreme Court of the United States held that the Fedal constitutional guarantee against unreasonable searches and seizures applied to States forfeiture proceedings (380 U. S. at 696). The Supreme Court reversed a Pennsylvania decision "in a forfeiture proceeding which the Pennsylvania court deemed civil in nature" (380 U.S. at 695). The Supreme Court held that the "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal." (380 U.S. at 697). "Its object, like a criminal proceeding, is to penalize for the commisison of an offense against the law" (380 U.S. at 700). "In this forfeiture

proceeding he was subject to the loss of his automobile, which at the time involved had an estimated value of approximately $1000, a higher amount than the maximum fine in the criminal proceeding. It would be anomalous indeed, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible. That the forfeiture is clearly a penalty for the criminal offense and can result in even greater punishment than the criminal prosecution has in fact been recognized by the Pennsylvania courts" (380 U.S. at 701).

5. *Municipal Ordinance Violation*

The Supreme Court of the United States held that, as a matter of Federal constitutional law, a prosecution under a municipal ordinance is a "*criminal*" case, as follows:

A. In *Camara* v. *Municipal Court of the City and County of San Francisco,* 387 U.S. 523, decided June 5, 1967, the Supreme Court of the United States held that enforcement of a municipal ordinance which may result in the imposition of a fine or imprisonment is a criminal case protected by the Federal Constitution as such. The Supreme Court of the United States overruled its earlier decisions and the California Court of Appeals which held that a city ordinance "is part of a regulatory scheme which is essentially civil rather than criminal" (387 U.S. at 528). The Supreme Court of the United States, on the contrary, said (387 U.S. at 540): "In this case, the appellant [defendant below] has been charged with a crime." The Supreme Court of the United States referred to the proceeding as one "enforced by criminal processes", by a "criminal complaint", constitutes "a criminal offense" and is "a crime, punishable by fine or even by jail sentence" (387 U.S. at 531).

B. In *See* v. *City of Seattle,* 387 U.S. 541, also decided by the Supreme Court of the United States on June 5, 1967, the defendant was fined $100.00 for the violation of a city ordinance and the fine was suspended (387 U.S. at 542). The Supreme Court of the United States reversed the conviction and, following the above-discussed *Camara* case, held that it was a criminal case protected by the Federal Constitution as such.

In *Avery* v. *Midland County,* 390 U.S. 474 (1968), the Supreme Court of the United States said: "[I]t is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment (citing in the footnote, among other cases, *See* v. *City of Seattle,* 387 U.S. 541). The actions of local government *are* the actions of the State". (390 U.S. at 480)

6. *Disciplinary Proceeding*

In *Spevack* v. *Klein,* 385 U.S. 511 (1967), a request was made that Spevack, a New York lawyer, produce his records in a disciplinary proceeding. Spevack refused to comply with this request, contending that if he produced his records, the evidence might show that he was involved in soliciting which would result in the deprivation of his right to earn a livelihood through the practice of law. In *Spevack* v. *Klein,* the Supreme Court of the United States held that depriving a lawyer of the right to practice law constitutes a "penalty" (385 U.S. at 514-515) and is, therefore, protected by the Fifth Amendment to the Constitution of the United States which provides: "No person . . . shall be compelled *in any criminal case* to be a witness against himself." To so hold, the Supreme Court of the United States had to reach the conclusion that a disciplinary proceeding, which may result in the penalty

of revocation of a license to practice a trade or profession, is a "criminal case", for otherwise there would be no occasion to apply the Fifth Amendment prohibiting self-incrimination in "*any criminal case*"[1] It is, therefore, clear that the holding of *Spevack* v. *Klein* is that a disciplinary proceeding is a "criminal case".

Since the decision of *Spevack* v. *Klein*, the Supreme Court of the United States has set aside other judgments in disciplinary proceedings, as follows:

A. In the case of *In Re Kaye*, 266 N.Y.S. 2d 69, the New York Court disbarred Louis Kaye, effective February 14, 1966. The New York Court, citing an earlier case, said at page 70:

> "Disciplinary proceedings are not criminal proceedings, and the 'refusal to testify raises the legal presumption of the truth of these facts, which must have been known to defendant, and which he failed to contradict.' "

The Supreme Court of the United States did not agree with this position and vacated the disbarment judgment against Louis Kaye and remanded the case to the New York Court

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[1] It must not be overlooked that the constitutional privilege against self-incrimination may come into play in criminal cases, civil cases, administrative hearings, congressional investigations, and proceedings of all kinds, because a self-incriminating statement which is made in a civil case or in any other proceeding may result in the disclosure of evidence either supporting criminal prosecution or leading to evidence which would support criminal prosecution of the person who makes the statement, thereby resulting in self-incrimination. In the *Spevack* case, the only ill effect on the lawyer would have been that his statement would lead to disbarment, which "is a punishment or penalty imposed on the lawyer" (*In re Ruffalo*, 390 U.S. 544 at 550, 551) and therefore "criminal" in effect.

for reconsideration in light of *Spevack* v. *Klein. Kaye* v. *Co-ordinating Committee on Discipline of Association of Bar of City of New York,* 386 U.S. 17 (1967).

B. In the case of *In Re Zuckerman,* 259 N.Y.S. 2d 963, the New York Court disbarred Landen Zuckerman, effective 30 days from March 3, 1965, because the respondent was guilty of the submission of misleading, exaggerated and false medical bills and statements covering lost time and earnings for insurance purposes, building up medical bills by referring claimants to a succession of doctors and using investigators to obtain signed retainers, to obtain statements from parties represented by attorneys and to obtain signatures on blank forms for appointment of guardians ad litem. However, the New York Court also took into consideration the fact that "respondent, Zuckerman, deliberately refused to cooperate with the court in its efforts to expose unethical practices and to determine whether he had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the Bar." (259 N.Y.S. 2d at 964). The Supreme Court of the United States vacated the disbarment judgment and remanded the case to the New York Court for reconsideration in light of *Spevack* v. *Klein. Zuckerman* v. *Greason,* 386 U.S. 15, and rehearing denied. *Zuckerman* v. *Greason,* 386 U.S. 969 (1967).

In re Ruffalo, 390 U.S. 544 (1968), the Supreme Court of the United States said:

> "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. * * * These are adversary proceedings of a quasi-criminal nature." (390 U.S. at 550, 551)

III.

DOUBLE JEOPARDY

Prior to 1967, it was common practice to proceed with disciplinary proceedings against lawyers who had been criminally convicted for income tax evasion. These proceedings resulted in most cases in Illinois in a suspension from the practice of law for several years. See *In re Teitlebaum,* 13 Ill. 2d 586 (1958), three year suspension; *In re Greenberg,* 21 Ill. 2d 170 (1961), two year suspension; *In re Revzan,* 33 Ill. 2d 197 (1965), two year suspension; *In re Sullivan,* 33 Ill. 2d 548 (1965), three year suspension. Since disciplinary proceedings were, prior to 1967, considered "civil," there was no "double jeopardy" involved. But now that *Spevack* v. *Klein,* 385 U.S. 511 (1967), has determined that depriving a person of a license which is the means of earning a livelihood constitutes the imposition of a "penalty," the disciplinary proceeding resulting in a suspension involves additional punishment (that is, a second "penalty") for the same tax evasion for which the defendant has already paid a penalty in the criminal conviction. This constitutes "double jeopardy" prohibited by the Fifth Amendment to the Constitution of the United States.

Formerly, it was held that where the same act constitutes a violation of State and Federal law, two prosecutions may be had without violating the double jeopardy principal (21 Am. Jur. 2d, Criminal Law § 192). Now that the "double jeopardy" prohibition of the Fifth Amendment is applicable to State as well as to Federal prosecutions, double punishment for the same act is abhorrent to the constitutional protection. Furthermore, the former distinction, which was based on the source of the law involved, is a play on semantics, grossly un-

realistic and violates the true spirit of due process of law. A sovereign should not be allowed to "foreclose the exercise of constitutional rights by mere labels" (*N.A.A.C.P.* v. *Button*, 371 U.S. 415, 429 (1963).

The "source of law" distinction between State and Federal origin has already been rejected by the Supreme Court of the United States in *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964). In *Murphy*, persons had been subpoenaed to testify at a hearing conducted by the Waterfront Commission. Although they were granted immunity from prosecution under State laws, they refused to testify "on the ground that the answers might tend to incriminate them under *federal* law, to which the grant of immunity did not purport to extend" (378 U.S. at 54). The Supreme Court of the United States reversed prior rulings on this point and said: "We hold that the constitutional privilege against self-incrmination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." (378 U.S. at 77-78). "[We] hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." (378 U.S. at 79).

It is of interest to note that in disciplinary proceedings based on a federal conviction, the respondent is not allowed in Illinois, to contradict the purported facts upon which the federal conviction is based, as "The record of conviction of respondent is conclusive of his guilt and it has been established in this State that we cannot go behind such rec-

ord." *In re Teitlebaum,* 13 Ill. 2d 586, 590 (1965). In the disciplinary proceeding, the respondent is limited, in Illinois, to the introduction of "facts and circumstances in aggravation or mitigation of each case in an effort to determine an appropriate penalty." *In re Sullivan,* 33 Ill. 2d 548, 554 (1966). In the opinion in the case at bar, the Supreme Court of Illinois stresses the proposition that the federal income tax "conviction" is "conclusive evidence of guilt; and that such conviction *per se* justifies disciplinary action" and that the court is limited "to consider the facts and circumstances in aggravation or mitigation in each case in determining the penalty to be imposed." Thus, the accused lawyer is deprived of an opportunity to prove himself not guilty in the State proceeding, but is nevertheless subjected to a second "punishment" (See *In re Ruffalo,* 390 U.S. 544, 550, 551 (1968), quoted from at page 13, *ante*).

In 1963-1964, Nathan Shavin was, in a very realistic sense, suspended from the practice of law for one year (while he was incarcerated in the Federal penitentiary) for something which he had purportedly done in 1954-1955—nine or ten years previously. In 1968 he is ordered by the Supreme Court of Illinois to be suspended again from the practice of law for two years for the same offense which he had purportedly committed in 1954-1955—thirteen years previously. If the lapse of time is intended as a "cure," the time has long passed. If it is intended as a second punishment for the same act, it constitutes double jeopardy and violates the true spirit of due process of law.

The basic distinction between disbarment, on the one hand, and suspension, on the other hand, must not be overlooked. While disbarment may be necessary to remove an incompetent person from the practice of law, suspension is, in its very essence and per se, punitive in nature. Its objective is, like all punishment, to operate as a deterrent or as a retaliation.

As shown above, the judgment of the Supreme Court of Illinois violates the Fifth Amendment to the Constitution of the United States prohibiting double jeopardy.

Article VI of the Constitution of the United States provides: "This Constitution, and the laws of the United States * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."

CONCLUSION

For the above and foregoing reasons, the petitioner prays that a writ of certiorari issue from this Court to review the judgment of the Supreme Court of Illinois in this case.

Respectfully submitted,

GEORGE D. CROWLEY
Chicago, Illinois
Attorney for Petitioner

APPENDIX

APPENDIX I

OPINION OF THE SUPREME COURT OF ILLINOIS

Docket No. 40537

In re Nathan Shavin, Attorney, Respondent.

Mr. JUSTICE UNDERWOOD delivered the opinion of the court:

The sole question presented in this disciplinary proceeding is the extent of the punishment to be imposed upon respondent, Nathan Shavin, an attorney practicing in Chicago since 1926. Respondent was convicted in 1961 of knowingly filing false and fraudulent personal income tax returns for the years 1954 and 1955 in violation of section 7201 of Title 26 of the United States Code, and concurrent sentences of 18 months imprisonment were imposed on each of two counts together with fines totalling $5,000 and costs of $1,420.94. The conviction was affirmed in 1963 (*United States* v. *Shavin,* (7th cir.) 320 F.2d 308), and respondent served 12 months in the Federal penitentiary; the fines and costs were paid.

In 1964 a complaint was filed before the Committee on Grievances of the Chicago Bar Association sitting as commissioners of this court under our Rule 751. Their report recommending respondent's suspension from the practice of law for a period of two years was approved by the Board of Managers of the Association and is now before us together with respondent's exceptions thereto predicated upon his contention that the recommended discipline is excessive and that censure would be sufficient.

Respondent concedes, as he must, that the filing of false and fraudulent income tax returns is a crime involving

moral turpitude; that conviction thereof is conclusive evidence of guilt; and that such conuviction *per se* justifies disciplinary action. (*In re Sullivan,* 33 Ill. 2d 548, 553 and cases there cited; see, also, Anno., 59 A.L.R. 2d 1938.) Equally well established is our responsibility to consider the facts and circumstances in aggravation or mitigation in each case in determining the penalty to be imposed. *Sullivan; In re Revzan,* 33 Ill.2d 197; *In re Crane,* 23 Ill.2d 398.

The stipulated or admitted facts indicate respondent's practice consisted almost entirely of personal injury work for plaintiffs in which unsettled cases were referred to other lawyers for trial. Very loose bookkeeping methods prevailed, and, while the amount of unreported income for the years in question was alleged by the government to be $28,104.50 and $61,063.01, it is stipulated that there were deductible items paid out during those years which were not included in the returns. The actual amount of unreported income is claimed to be substantially less than that charged; it is as yet undetermined and the subject matter of a suit presently pending in the United States Tax Court. A number of lawyers and a judge testified that respondent's reputation for integrity and honesty was good, and it is not contended that any client was dissatisfied with the manner in which a case was handled. Respondent underwent surgery in 1966 and subsequently suffered a heart attack necessitating some hospitalization and a period of convalescence.

Also urged in mitigation is respondent's claim that settlement checks received from insurance companies approximating $30,000 during each of the questioned years were never deposited or cashed by him despite the fact that respondent's normal practice was to pay from his personal funds the amount due the client, secure the client's signature upon the release form and then present the signed release to the insurer in exchange for the settlement check

which respondent would then endorse and deposit or cash. Respondent also sometimes paid from his own funds the client's medical expenses and auto repair bills. While seemingly well-nigh incredible, it is stipulated that these settlement checks were apparently uncashed and undeposited.

In the six cases wherein we have imposed disciplinary measures upon willful violators of the Federal income tax laws, we have found censure appropriate in one instance (*In re Crane,* 23 Ill.2d 398), ordered disbarment in another (*In re Tinkoff,* No. 23356, not reported), decreed two-year suspensions from practice in two other cases (*In re Greenberg,* 21 Ill.2d 170; *In re Revzan,* 23 Ill.2d 197), and ordered three-year suspensions in the remaining two instances. (*In re Teitelbaum,* 13 Ill.2d 586; *In re Sullivan,* 33 Ill.2d 548.) The only disciplinary proceeding in which less than a two-year period of suspension has been imposed by us in these cases was *Crane* in which the Federal trial judge had suspended imposition of sentence and granted respondent probation conditioned upon payment of a fine. There, one of three questioned items of income was actually reported, the failure to report the second was claimed to be negligent oversight, and the third was assertedly due to incorrect information supplied by third persons; additionally, this court in determining the appropriate discipline, in *Crane,* considered matters which the commissioners there had erroneously thought inadmissible for that purpose. We find no comparable extenuating circumstances in this case and accordingly hold that the respondent should be suspended from the practice of law for two years, and it is so ordered.

Respondent suspended.

APPENDIX II

JUDGMENT ORDER OF THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA

STATE OF ILLINOIS)
) ss
Supreme Court)

AT A TERM OF THE SUPREME COURT, *begun and held in Springfield, on Monday, the thirteenth day of May in the year of our Lord, one thousand nine hundred and sixty-eight, within and for the State of Illinois.*

Present: Roy J. Solfisburg, Jr., Chief Justice
Justice Walter V. Schaefer — Justice Ray I. Klingbiel
Justice Byron O. House — Justice Robert C. Underwood
Justice Thomas E. Kluczynski — Justice Daniel P. Ward
William G. Clark, Attorney General
Robert G. Miley, Marshal
Attest: Clell L. Woods, Clerk

BE IT REMEMBERED, that, to-wit: on the 29th day of May, A D. 1968, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

In re:	)	
No. 40537	)	Information
Nathan Shavin,	)	1352
an Attorney	)	

And now, on this day, the Court having duly considered the Report of Commissioners, and exceptions thereto, together with the briefs filed herein, and being fully advised in the premises;

IT IS HEREBY ORDERED that respondent, Nathan Shavin, be suspended from the practice of law in the State of Illinois for a period of two years.

APPENDIX III

IN THE SUPREME COURT OF ILLINOIS

In The Matter OF NATHAN SHAVIN, An Attorney

PETITION FOR REHEARING

Nathan Shavin, petitioner, respectfully represents that this Honorable Court, in rendering its judgment and opinion in the above entitled matter, on May 29, 1968, has overlooked the following:

THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PROHIBITING DOUBLE JEOPARDY

I.

FEDERAL BILL OF RIGHTS IN CRIMINAL CASES

The Fourth, Fifth, Sixth and Eighth Amendments to the Constitution of the United States guarantee procedural due process in criminal cases. The Supreme Court of the United States has established, through a long series of decisions rendered in recent years, that the protection of these Amendments is not limited to proceeding in the Federal Court only—as had been previously held—but applies also to prosecution of criminal cases in state courts, as shown by the following:

Fourth Amendment: search and seizure, *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Marcus* v. *Search Warrants*, 367 U.S. 717 (1961); *Berger* v. *New York*, 388 U.S. 41 (1967).

Fifth Amendment: self-incrimination, *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

Sixth Amendment: assistance of counsel, *Gideon* v. *Wainwright,* 372 U.S. 355 (1963); *Douglas* v. *California,* 372 U.S. 353 (1963); *Ecobedo* v. *Illinois,* 378 U.S. 478 (1964); *Miranda* v. *Arizona,* 384 U.S. 436 (1966); *Swenson* v. *Bosler,* 386 U.S. 258 (1967); *Anders* v. *California,* 386 U.S. 738 (1967); *Entsminger* v. *Iowa,* 386 U.S. 748 (1967); *Gilbert* v. *California,* 388 U.S. 263 (1967); *Milani* v. *Illinois,* 386 U.S. 12 (1967); *Hemphill* v. *Illinois,* 388 U.S. 465 (1967); *Mempa* v. *Rhay,* 389 U.S. 128 (1967); speedy trial, *Klopfer* v. *North Carolina,* 385 U.S. 213 (1967); compulsory process for obtaining witnesses, *Washington* v. *Texas,* 388 U.S. 14 (1967); confrontation with witnesses, *Pointer* v. *Texas,* 380 U.S. 400 (1965); *Douglas* v. *Alabama,* 380 U.S. 415 (1965); *Smith* v. *Illinois,* 390 U.S. 129 (1968); *Barber* v. *Page,* 20 L. Ed. 2d 255 (1968); trial by jury in criminal cases which do not fall within the category of "petty" offenses, *Duncan* v. *Louisiana,* 20 L. Ed. 2d 491 (1968); *Bloom* v. *Illinois,* 20 L. Ed. 2d 522 (1968); *Dyke* v. *Taylor Implement Co.,* 20 L. Ed. 2d 538 (1968).

Eighth Amendment: cruel and unusual punishment, *Robinson* v. *California,* 370 U.S. 660 (1962).

Recently, the Supreme Court of the United States rendered a number of important decisions which must awaken the legal profession to the realization that the difference between "civil" and "criminal" cannot rest on arbitrary labeling by courts and legislatures, but requires careful examination of legal consequences to distinguish reality from fiction. The Supreme Court of the United States made it clear that a "State cannot foreclose the exercise of constitutional rights by mere labels." *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 429 (1963).

II.

PROCEEDINGS FORMERLY "CIVIL" ARE NOW "CRIMINAL"

1. *Juvenile Delinquency*

A proceeding against a juvenile delinquent was held by the Arizona state court to be "civil." But, in the case of *In re Gault,* 387 U.S. 1 (1967), the Supreme Court of the United States reversed the Arizona decision and held that it was a "criminal case" protected by the Federal Constitution. The Court pointed out that "proceedings to determine 'delinquency', which may lead to commitment to a state institution must be regarded as 'criminal' for purposes of the" federal constitutional guarantees (387 U.S. at 49). The Court accented that "commitment is a deprivation of liberty. It is incarceration against one's will." (387 U.S. at 50).[1]

In the case of *In re Urbasek,* 38 Ill. 2d 535 (1967), the Supreme Court of Illinois followed *In re Gault* and held that a delinquency proceeding and the Juvenile Division of an Illinois Circuit Court is a criminal proceeding and the juvenile had to be proven guilty, as in other criminal cases, beyond a reasonable doubt, and the preponderance of evidence rule in civil cases did not apply.

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[1] In the case of *In re Whittington,* 20 L.Ed. 2d 625 (1968), the Supreme Court said at page 628-29: "In *Gault,* this Court held squarely, for the first time, that various of the federal constitutional guarantees accompanying ordinary criminal proceedings were applicable to state juvenile court proceedings where possible commitment to a state institution was involved. * * * The judgment is vacated and the case is remanded to the Ohio Court of Appeals of Fairfield County for consideration in light of *In re Gault,* 387 U.S. 1, 18 L.Ed. 2d 527, 87 S.Ct. 1428 (1967)."

In the case of *In re Marsh,* 237 N.E.2d 529, decided on May 29, 1968, the Supreme Court of Illinois held the Fourth Amendment protection against illegal search and seizure applicable to proceedings under the Illinois Juvenile Court Act.

In the cases of *In re Boykin,* 237 N.E.2d 460, and *In re Marsh,* 237 N.E.2d 529, both decided on May 29, 1968, the Supreme Court of Illinois held that indigent juveniles who were found to be delinquent were entitled to free transcripts for appeal. On the same day, the Supreme Court of Illinois adopted Rule 661 providing for appointment of appellate counsel and free transcripts for indigent juvenile delinquents on whose behalf appeals are prosecuted.

2. *Sex Offenses*

A proceeding under the Colorado Sex Offenders Act was treated by the Colorado State Court as a "civil" proceeding, the same as the Illinois statute treated a proceeding under the Sexually Dangerous Persons Act (Ill. Rev. Stat., 1967, ch. 38, §105.3.01 and ch. 108 §112).

In *Specht* v. *Patterson,* 386 U.S. 605 (1967), the Supreme Court of the United States reversed the Supreme Court of Colorado and held that a proceeding against a person with sexually aggressive tendencies is a "criminal case" protected by the Federal Constitution, as the deprivation of liberty by confinement "is criminal punishment even though it is to keep individuals from inflicting future harm". (386 U.S. at 608-609.)

The Appellate Court of Illinois, in *People* v. *Potter,* 86 Ill. App. 2d 151 (1967), cited and followed *Specht* v. *Patterson.*

The Illinois Sexually dangerous Persons Act (Ill. Rev. Stat., 1967, Ch. 38, §105-3.01) provides: "The proceedings under this Act shall be civil in nature. The provisions of the civil practice Act including the provisions for appeal and all existing and future amendments of said Act and modifications thereof and the rules now or hereafter adopted pursuant to said Act shall apply to all proceedings hereunder except as otherwise provided in this Act." In *People* v. *Capoldi,* 37 Ill. 2d 11 (1967), the Supreme Court of Illinois said: "We have held in proceedings under the Sexually Dangerous Persons Act that *a defendant must be accorded the same procedural safeguards available to an accused in a criminal trial* even though the proceedings are civil in nature." (37 Ill. 2d at 15). (Emphasis supplied)

3. *Revocation of Probation*

Prior to 1967, a proceeding for the revocation of probation was held to be "civil".[2] In *Mempa* v. *Rhay,* 389 U.S. 128, decided on November 13, 1967, the Supreme Court of the United States held that, in a proceeding to revoke probation, the defendant has a right to assistance of counsel under the Sixth Amendment to the Constitution of the United States. Thus, the Supreme Court determined that revocation of probation is a "criminal", not a "civil", proceeding.

In *People* v. *Coffman,* 83 Ill. App. 2d 272, decided on June 1, 1967, the Appellate Court of Illinois reversed the judgment of the trial court on the basis of lack of due process because the defendant was not represented by counsel in a proceeding for the revocation of probation.

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[2] See Fins, "Illinois Court Practice Under The New Judicial Article" (1967 edition) at pages 163-164.

In this sphere, the Supreme Court of the United States (which reviewed a case from the State of Washington) and the Appellate Court of Illinois reached their respective conclusions independent of each other, but the result is the same.

4. *Forfeiture Proceeding*

Prior to 1965, a proceeding for the forfeiture, destruction, disposition or recovery of property seized or confiscated as contraband was considered by the Illinois courts as "civil".[3]

In *Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965), the Supreme Court of the United States held that the Federal constitutional guarantee against unreasonable searches and seizures applied to States forfeiture proceedings (380 U.S. at 696). The Supreme Court reversed a Pennsylvania decision "in a forfeiture proceeding which the Pensylvania court deemed civil in nature" (380 U.S. at 695). The Supreme Court held that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal." (380 U.S. at 697). "Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law" (380 U.S. at 700). "In this forfeiture proceeding he was subject to the loss of his automobile, which at the time involved had an estimated value of approximately $1000, a higher amount than the maximum fine in the criminal proceeding. It would be anomalous indeed, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible.

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[3] Ibid. at pages 160-161.

That the forfeiture is clearly a penalty for the criminal offense and can result in even greater punishment than the criminal prosecution has in fact been recognized by the Pennsylvania courts" (380 U.S. at 701).

5. *Municipal Ordinance Violation*

The Supreme Court of the United States held that, as a matter of Federal constitutional law, a prosecution under a municipal ordinance is a "*criminal*" case, as follows:

A. In *Camera* v. *Municipal Court of the City and County of San Francisco,* 387 U.S. 523, decided June 5, 1967, the Supreme Court of the United States held that enforcement of a municipal ordinance which may result in the imposition of a fine or imprisonment is a criminal case protected by the Federal Constitution as such. The Supreme Court of the United States overruled its earlier decisions and the California Court of Appeals which held that a city ordinance "is part of a regulatory scheme which is essentially civil rather than criminal" (387 U.S. at 528). The Supreme Court of the United States, on the contrary, said (387 U.S. at 540): "In this case, the appellant [defendant below] has been charged with a crime." The Supreme Court of the United States referred to the proceeding as one "enforced by criminal processes", by a "criminal complaint", constitutes "a criminal offense" and is "a crime, punishable by fine or even by jail sentence" (387 U.S. at 531).

B. In *See* v. *City of Seattle,* 387 U.S. 541, also decided by the Supreme Court of the United States on June 5, 1967, the defendant was fined $100.00 for the violation of a city ordinance and the fine was suspendeed (387 U.S. at 542). The Supreme Court of the United States reversed the conviction and, following the above-discussed *Camara*

case, held that it was a criminal case protected by the Federal Constitution as such.[4]

In *Village of Park Forest* v. *Bragg*, 38 Ill. 2d 225 (1967), *amici curiae* urged the Supreme Court of Illinois to follow the above discussed *Camara* and *See* cases, but the Supreme Court of Illinois neither followed nor cited these decisions of the Supreme Court of the United States and persisted in relying upon earlier Illinois decisions of the pre-*Camara* and *See* period, holding that a prosecution for the violation of a municipal ordinance was a "civil" case.

6. *Disciplinary Proceeding*

In *Spevack* v. *Klein*, 385 U.S. 511 (1967), a request was made that Spevack, a New York lawyer, produce his records in a disciplinary proceeding. Spevack refused to comply with this request, contending that if he produced his records, the evidence might show that he was involved in soliciting which would result in the deprivation of his right to earn a livelihood through the practice of law. In *Spevack* v. *Klein*, the Supreme Court of the United States held that depriving a lawyer of the right to practice law constitutes a "penalty" (385 U.S. at 514-515) and is, therefore, protected by the Fifth Amendment to the Constitution of the United States which provides: "No person . . . shall be compelled *in any criminal case* to be a witness against himself." To so hold, the Supreme Court of the United States had to reach the conclusion that a

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[4] In *Avery* v. *Midland County*, 20 L.Ed. 2d 45 (1968), the Supreme Court of the United States said: "[I]t is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment (citing in the footnote, among other cases, *See* v. *City of Seattle*, 387 U.S. 541). The actions of local government *are* the actions of the State". (20 L.Ed. at 51)

disciplinary proceeding, which may result in the penalty of revocation of a license to practice a trade or profession, is a "criminal case", for otherwise there would be no occasion to apply the Fifth Amendment prohibiting self-incrimination in "*any criminal case*".[5] It is, therefore, clear that the holding of *Spevack* v. *Klein* is that a disciplinary proceeding is a "criminal case".

Since the decision of *Spevack* v. *Klein,* the Supreme Court of the United States has set aside other judgments in disciplinary proceedings, as follows:

A. In the case of *In Re Kaye,* 266 N.Y.S. 2d 69, the New York Court disbarred Louis Kaye, effective February 14, 1966. The New York Court, citing an earlier case, said at page 70:

> "Disciplinary proceedings are not criminal proceedings, and the 'refusal to testify raises the legal presumption of the truth of these facts, which must have been known to defendant, and which he failed to contradict.' "

The Supreme Court of the United States did not agree with this position and vacated the disbarment judgment against Louis Kaye and remanded the case to the New York Court

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[5] It must not be overlooked that the constitutional privilege against self-incrimination may come into play in criminal cases, civil cases, administrative hearings, congressional investigations, and proceedings of all kinds, because a self-incriminating statement which is made in a civil case or in any other proceeding may result in the disclosure of evidence either supporting criminal prosecution or leading to evidence which would support criminal prosecution of the person who makes the statement, thereby resulting in self-incrimination. In the *Spevack* case, the only ill effect on the lawyer would have been that his statement would lead to disbarment, which "is a punishment or penalty imposed on the lawyer" (*In re Ruffalo,* 20 L.Ed. 2d 117, 122) and therefore "criminal" in effect.

for reconsideration in light of *Spevack* v. *Klein*. *Kaye* v. *Co-ordinating Committee on Discipline of Association of Bar of City of New York*, 386 U.S. 17 (1967).

B. In the case of *In re Zuckerman*, 259 N.Y.S. 2d 963, the New York Court disbarred Landon Zuckerman, effective 30 days from March 3, 1965, because the respondent was guilty of the submission of misleading, exaggerated and false medical bills and statements covering lost time and earnings for insurance purposes, building up medical bills by referring claimants to a succession of doctors and using investigators to obtain signed retainers, to obtain statements from parties represented by attorneys and to obtain signatures on blank forms for appointment of guardians ad litem. However, the New York Court also took into consideration the fact that "respondent, Zuckerman, deliberately refused to cooperate with the court in its efforts to expose unethical practices and to determine whether he had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the Bar." (259 N.Y.S. 2d at 964). The Supreme Court of the United States vacated the disbarment judgment and remanded the case to the New York Court for reconsideration in light of *Spevack* v. *Klein*. *Zuckerman* v. *Greason*, 386 U.S. 15, and rehearing denied. *Zuckerman* v. *Greason*, 386 U.S. 969 (1967).

In the case of *In re Damisch*, 38 Ill. 2d 195 (1967), the Supreme Court of Illinois followed *Spevack* v. *Klein* in holding that a disciplinary proceeding involved "punishment" (38 Ill. 2d at 206), but persisted in relying upon earlier Illinois decisions of the pre-*Spevack* period in holding that "a disciplinary proceeding is not a criminal prosecution and is not subject to all the rules that govern such

a case. E.g., *In re Anderson,* 370 Ill. 515, 522; *In re Needham,* 364 Ill. 65, 68" (38 Ill. 2d at 206). *The Anderson* case was decided in 1939 and the *Needham* case in 1936, more than a quarter of a century before the decision in *Spevack* v. *Klein.*[6]

In re Ruffalo, 20 L.Ed. 2d 117 (1968), the Supreme Court of the United States said:

> **"Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. * * * These are adversary proceedings of a quasi-criminal nature."** (20 L.Ed 2d at 122)

III.

DOUBLE JEOPARDY

In its opinion, the Supreme Court of Illinois has stated the facts in the case at bar as follows:

> "The sole question presented in this disciplinary proceeding is the extent of the punishment to be imposed upon respondent, *Nathan Shavin, an attorney practicing in Chicago since 1926.* Respondent was convicted in 1961 of knowingly filing false and fraudulent personal income tax returns for the years 1954 and 1955 in violation of section 7201 of Title 26 of the

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[6] The *Damisch* case was not and (in the opinion of the writer) could not be reviewed by the Supreme Court of the United States, as the Supreme Court of Illinois said: "We conclude that the appropriate disciplinary measure in this instance is censure, and it is so ordered" (38 Ill. 2d at 209). An order of censure is merely an expression of the court's "displeasure" with the respondent's conduct, but it does not deprive the respondent of liberty, property, or the right to earn a livelihood in his chosen profession. It is, therefore, not a "judgment" which is reviewable by the Supreme Court of the United States. (Research has not disclosed a case directly in point).

United States Code, and concurrent sentences of 18 months imprisonment were imposed on each of two counts together with fines totalling $5,000 and costs of $1,420.94. The conviction was affirmed in 1963 (*United States* v. *Shavin*, (7th Cir.) 320 F. 2d 308), and respondent served 12 months in the Federal penitentiary; the fines and costs were paid.

* * *

"The stipulated or admitted facts indicate respondent's practice consisted almost entirely of personal injury work for plaintiffs in which unsettled cases were referred to other lawyers for trial. *Very loose bookkeeping methods prevailed, and* while the amount of unreported income for the years in question was alleged by the government to be $28,104.50 and $61,063.01, *it is stipulated that there were deductible items paid out during those years which were not included in the returns. The actual amount of unreported income is claimed to be substantially less than that charged; it is as yet undetermined and the subject matter of a suit presently pending in the United States Tax Court. A number of lawyers and a judge testified that respondent's reputation for integrity and honesty was good, and it is not contended that any client was dissatisfied with the manner in which a case was handled.* Respondent underwent surgery in 1966 and subsequently suffered a heart attack necessitating some hospitalization and a period of convalescence.

"Also urged in mitigation is respondent's claim that *settlement checks received from insurance companies approximating $30,000 during each of the questioned years were never deposited or cashed by him despite the fact that respondent's normal practice was to pay from his personal funds the amount due the client, secure the client's signature upon the release form and then present the signed release to the insurer in exchange for the settlement check which respondent would then endorse and deposit or cash. Respondent* also sometimes paid from his own funds the client's

medical expenses and auto repair bills. While seemingly well-nigh incredible, *it is stipulated that these settlement checks were apparently uncashed and undeposited.*" (Emphasis supplied.)

Prior to 1967, it was common practice to proceed with disciplinary proceedings against lawyers who had been criminally convicted for income tax evasion. These proceedings resulted in most cases in a suspension from the practice of law for several years.[7] Since disciplinary proceedings were, prior to 1967, considered "civil," there was no "double jeopardy" involved. But now that *Spevack* v. *Klein*, 385 U.S. 511 (1967), has determined that depriving a person of a license which is the means of earning a livelihood constitutes the imposition of a "penalty," the disciplinary proceeding resulting in a suspension involves additional punishment (that is, a second "penalty") for the same tax evasion for which the defendant has already paid a penalty in the criminal conviction. This constitutes "double jeopardy" prohibited by the Fifth Amendment to the Constitution of the United States.

Formerly, it was held that where the same act constitutes a violation of State and Federal law, two prosecutions may be had without violating the double jeopardy principal (21 Am. Jur. 2d, Criminal Law § 192). Now that the "double jeopardy" prohibition of the Fifth Amendment is applicable to State as well as to Federal prosecutions, double punishment for the same act is abhorrent to the constitutional protection. Furthermore, the former distinction, which was based on the source of

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[7] See *In re Teitlebaum*, 13 Ill. 2d 586 (1958), three year suspension; *In re Greenberg*, 21 Ill. 2d 170 (1961), two yeear suspension; *In re Revzan*, 33 Ill. 2d 197 (1965), two year suspension; *In re Sullivan*, 33 Ill. 2d 548 (1965), three year suspension.

the law involved, is a play on semantics, grossly unrealistic and violates the true spirit of due procees of law. A sovereign should not be allowed to "foreclose the exercise of constitutional rights by mere labels" (*N.A.A.C.P.* v. *Button,* 371 U.S. 415, 429 (1963).

It is of interest to note that in disciplinary proceedings based on a federal conviction, the respondent is not allowed to contradict the purported facts upon which the federal conviction is based, as "The record of conviction of respondent is conclusive of his guilt and it has been established in this State that he cannot go behind such record." *In re Teitelbaum,* 13 Ill. 2d 586, 590 (1965). In the disciplinary proceeding, the respondent is limited to the introduction of "facts and circumstances in aggravation or mitigation of each case in an effort to determine an appropriate penalty." *In re Sullivan,* 33 Ill. 2d 548, 554 (1966). In the opinion in the case at bar, the Supreme Court of Illinois stresses the proposition that the federal income tax "conviction" is "conclusive evidence of guilt; and that such conviction *per se* justifies disciplinary action" and that the court is limited "to consider the facts and circumstances in aggravation or mitigation in each case in determining the penalty to be imposed." Thus, the accused lawyer is deprived of an opportunity to prove himself not guilty in the State proceeding, but is nevertheless subjected to a second "punishment" (See *In re Ruffalo,* 20 L.Ed 2d 117, 122 (1968), quoted from page 11, *ante*).

In 1963-1964, Nathan Shavin was, in a very realistic sense, suspended from the practice of law for one year (while he was incarcerated in the Federal penitentiary) for something which he had purportedly done in 1954-1955—nine or ten years previously. In 1968 he is ordered

by the Supreme Court of Illinois to be suspended again from the practice of law for two years for the same offense which he had purportedly committed in 1954-1955—thirteen years previously. If the lapse of time is intended as a "cure," the time has long passed. If it is intended as a second punishment for the same act, it constitutes double jeopardy and violates the true spirit of due process of law.

As shown above, the judgment of the Supreme Court of Illinois violates the Fifth Amendment to the Constitution of the United States prohibiting double jeopardy.

Article VI of the Constitution of the United States provides: "This Constitution, and the Laws of the United States * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution of Laws of any State to the Contrary notwithstanding."

Wherefore, respondent prays that a rehearing be granted and that the respondent be discharged.

Respectfully submitted,

WILLIAM T. KIRBY,
JAMES T. GREEN
Attorneys for Petitioner

GEORGE D. CROWLEY
Of Counsel

APPENDIX IV

ORDER OF SUPREME COURT OF ILLINOIS DENYING PETITION FOR REHEARING

UNITED STATES OF AMERICA

STATE OF ILLINOIS)
) ss
Supreme Court)

AT A TERM OF THE SUPREME COURT, *begun and held in Springfield, on Monday, the ninth day of September in the year of our Lord, one thousand nine hundred and sixty-eight, within and for the State of Illinois.*

Present: Roy J. Solfisburg, Jr., Chief Justice
Justice Walter V. Schaefer — Justice Ray I. Klingbiel
Justice Byron O. House — Justice Robert C. Underwood
Justice Thomas E. Kluczynski — Justice Daniel P. Ward
William G. Clark, Attorney General
Robert G. Miley, Marshal
Attest: Clell L. Woods, Clerk

BE IT REMEMBERED, that, to-wit: on the 24th day of September, A.D. 1968, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

In re:	)	
No. 40537	)	
Nathan Shavin,	)	Information
An Attorney	)	

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

SUPREME COURT, U. S.
NOV 21 1968
JOHN F. DAVIS, CLERK

No. 679

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1968

In The Matter of NATHAN SHAVIN, An Attorney

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

JOHN CADWALADER MEINK
29 South La Salle Street
Chicago, Illinois 60603

Heretofore appearing as amicus curiae in the Supreme Court of Illinois for the Board of Managers and the Committee on Grievances of the Chicago Bar Association, Sitting as Commissioners of the Supreme Court of Illinois under Illinois Revised Statutes c. 110A § 751 (1967).

La Salle Street Press—Chicago/Printer/Ink

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STATEMENT OF THE CASE

The statement submitted by the Petitioner is adequate.

THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS DOES NOT VIOLATE THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PROHIBITING DOUBLE JEOPARDY.

I.

THE PETITIONER WAS NOT TWICE PUT IN JEOPARDY

At the outset we think it important to clearly define the central issue which is presented in the Petition For Writ of Certiorari. It is whether the Double Jeopardy Clause of the Fifth Amendment bars a State disciplinary proceeding against an attorney who has been convicted of the federal crime of income tax evasion. We will therefore not respond to matters in the Petition which are not relevant to this issue such as the length of time the Petitioner was an attorney or his conduct during that time, and other matters essentially extraneous in nature.

Petitioner was convicted of knowingly filing false and fraudulent personal income tax returns for the years 1954 and 1955 in violation of Section 7201 of Title 26 of the United States Code. The conviction was affirmed in 1963. (*United States* v. *Shavin*, 320 F. 2d 308 7th Cir. 1963.) Petitioner served twelve months of an eighteen-month sentence. Disciplinary proceedings were commenced against Nathan Shavin by the Chicago Bar Association in 1964 shortly after the final termination of Mr. Shavin's Federal Court proceedings.

The Board of Managers of the Chicago Bar Association, and its existing Committee on Grievances, are appointed by the Illinois Supreme Court, pursuant to Rule 751 (Ill. Rev. Stat. c. 110A sec. 751 (1967)), to "make investigations . . . concerning practices of attorneys at law which tend to de-

feat the administration of justice or to bring the courts and legal profession into disrepute." This power is invested in the Commissioners as a delegation of the Court's inherent and summary jurisdiction over attorneys practicing at its bar. (*In re Needham*, 364 Ill. 65, 4 N.E. 2d 19 (1936).) On the basis of the Commissioners' findings, following investigation and hearing, Rule 751 further provides that "if action by the Supreme Court of any kind is recommended, (the Commissioners shall) report to the Supreme Court . . . its conclusions of fact and law concerning the Complaint, answer, and proof" which shall be docketed as any other case. Thereupon the Supreme Court exercises its jurisdiction to enter the appropriate judgment. (Appendix I)

In the case at bar Petitioner was convicted of the federal crime of income tax evasion. Such a crime is deemed by the Supreme Court of the State of Illinois to involve moral turpitude. (*In re Needham*, 364 Ill. 65, 4 N.E. 2d 19 (1936); *In re Teitelbaum*, 13 Ill. 2d 586, 150 N.E. 2d 873 (1958); cert. den. 358 U.S. 88 (1958). In *Teitelbaum* the Court said at page 588, 874:

> "Moral turpitude has often been set up as a test. It can be applied in an infinite variety of situations by legislative enactment as well as judicial decision. It is for this reason that it eludes a precise definition which will cover all cases. Without attempting to limit the meaning of the phrase, we think it elementary that fraud or fraudulent conduct on the part of an attorney resulting in his conviction necessarily carries the connotation of moral turpitude."

The Illinois Supreme Court has long held that in disciplinary cases based upon the conviction of a crime involving moral turpitude, proof of such conviction is conclusive evidence of guilt and *per se* justifies disciplinary action. (*In re Sullivan*, 33 Ill. 2d 548, 213 N.E. 2d 257 (1966) and cases there cited. See also in 59 ALR 2d 1938.) The Petitioner had an opportunity to be heard at the disciplinary proceedings and did not deny his conviction; the remaining

evidence related to matters in mitigation. Petitioner in no way claims that his federal conviction was obtained on unconstitutional grounds or that the disciplinary proceedings were erroneous or improper in any way except for his now claimed double jeopardy.

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb . . ." The Petitioner contends that this clause is applicable to the case at bar. Our argument in opposition to this contention is set forth under Roman Numeral II, but we should like to observe that in any event the fact is that Petitioner was not "twice put in jeopardy".

In the case of *Abbate* v. *United States*, 359 U.S. 187 (1959) which concerned a labor dispute, Abbate and Falcone conspired to dynamite facilities of the Southern Bell Telephone and Telegraph Company. Both defendants pleaded guilty to a state charge of conspiring to injure or destroy the property of another and received prison sentences. Subsequently, both men were convicted of a federal charge of conspiring to destroy communication facilities controlled and operated by the United States. The convictions were affirmed by the Court of Appeals and the United States Supreme Court, and it was held that successive trials by two sovereigns were permissible without violation of fundamental constitutional liberties.

Mr. Justice Brennan, who delivered the opinion of the Court, pointed out that to permit the Double Jeopardy Clause to operate as a bar to separate prosecutions by state and federal sovereigns would "bring about a marked change in the distribution of powers to administer criminal justice, for the States under our federal system have the principal responsibility for defining and prosecuting crimes." Mr. Justice Brennan further pointed out, at page 198, that:

> ". . . The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be

> harassed by successive trials; that an accused shall not have to marshall the resources and energies necessary for his defense more than once for the same alleged criminal acts. 'The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense thereby subjecting him to embarrassment, expense and ordeal of compelling him to live in a continuing state of anxiety and insecurity . . .' *Green* v. *United States*, 355 U.S. 184, 187. In short, 'The prohibition is not against being twice punished, but against being twice put in jeopardy . . .' *United States* v. *Ball*, 163 U.S. 662, 669."

In the case at bar the rule and rationale of *Abbate* is quite applicable; Petitioner was not "twice put in jeopardy" even if it be considered that he was twice punished. Once Petitioner was convicted by the federal sovereign of a crime involving moral turpitude the proceeding by the state sovereign was merely for the purpose of determining the appropriate discipline to be imposed upon a lawyer whose conduct, as evidenced by a conviction of a crime involving moral turpitude, had brought the bench and bar into disrepute.

II.

A STATE DISCIPLINARY ACTION AGAINST AN ATTORNEY IS A CIVIL PROCEEDING

Petitioner contends that disciplinary proceedings against an attorney are "penal" or "criminal" in nature. In support of this contention he cites numerous cases alluded to by this Court in its opinion in the case of *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 429 (1963). This Court stated therein that a "State cannot foreclose the exercise of constitutional rights by mere labels." This is a patently sound proposition, and it is clear that many civil actions carry penal aspects. For example, "where punitive, vindictive or exemplary damages may be assessed they are allowed in the interest of society in the nature of punishment and as a warning and example

to deter the defendant and others from committing like offenses in the future . . ." (*Eshelman* v. *Rawalt*, 298 Ill. 192, 131 N.E. 675, 16 A.L.R. 1311 (1921).) In disciplinary proceedings involving attorneys at law the Illinois Supreme Court has recognized that such proceedings have some penal aspects, but the Court has emphasized that the prime function of such proceedings is other than penal in nature. In the case of *People* v. *Meyerovitz*, 278 Ill. 356, 116 N.E. 189 (1917) the Illinois Supreme Court said, at pages 364-365:

> "The disbarment of an attorney is not punishment for crime nor for the purpose of enforcing remedies between parties but to remove a person shown to be unfit for the discharge of the duties of the office and to protect the courts and the public."

Again, in the case of *In Re Borchardt*, 357 Ill. 458, 192 N.E. 383 (1934) the Court said at page 461:

> "This court does not strike the name of an attorney from the roll as a matter of punishment, but does so primarily to protect the public from further misdeeds of like character and to insure the high standing and reputation of the bar."

The rationale is well-stated by the late J. Russell Christianson in 45 Chi. Bar Rec. 57 (1963) in quoting *People* v. *Lamborn*, 2 Ill. 124, N.E. (1834).

> "The office of an attorney and counselor at law is one of great responsibility. To the lawyer is confided the cause of his client, and in the issue of that cause may be involved property, life, liberty and character. It results, then, from the magnitude of the interest committed to him, that he may be the means of much good, or of extensive mischief. When actuated by high and honorable motives, the innocent may with confidence look to him for protection and the injured for redress. But by basely betraying his trust, he becomes a scourge to society, and a stain to a profession everywhere esteemed honorable. Courts of justice ought, therefore, from a just sense of their own honor and integrity, as well as from a regard to the interest of the community,

> to be cautious whom they admit to minister in their temples, and firm in expelling from their portals those whose conduct would pollute the judicial altar."

The social interest which the state seeks to protect in a disciplinary proceeding against a lawyer is thus different from the interest that the federal government seeks to protect in a prosecution for tax evasion. In the former the state is policing its legal profession in order to protect the public, in the latter the federal government is concerned with the raising of revenue. (See: Notes, 45 Cornell Law Quarterly 574, 578 (1959).)* The social interest which is sought to be protected is an important factor to be considered, particularly where the character of the proceeding is ambiguous to the extent that it combines both civil and criminal remedies. (See *Dixon* v. *Alabama State Board of Education*, (5th Cir. 1961) 294 F. 2d 150.) In the case of Application of Gault, 387 U.S. 1 (1967) this Court, quoting with approval from *Kent* v. *United States*, said in regard to juvenile proceedings said at page 30:

> ". . . We do not mean * * * to indicate that the hearing to be held must conform with all the requirements of a criminal trial or even the usual administrative hearing; but we do hold that the hearing must measure up to the essential of due process and fair treatment."

Petitioner's basic argument is that since this Court's decision in *Spevack* v. *Klein*, 385 U.S. 511 (1967), a state disciplinary proceeding against a lawyer must be considered a "criminal case" with the respondent being entitled to all the constitutional privileges of an accused person in a criminal proceeding. We do not so read *Spevack*. This Court held in *Spevack* only that, under the circumstances there existing, the respondent was entitled to invoke the constitutional guarantee against self-incrimination. No-

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* To the extent that the different interests protected would permit a single sovereign to engage in multiple trials as a result of a single act is vigorously objected to by Mr. Justice Brennan in *Abbate*.

where in the opinion does this Court say that a state disciplinary proceeding against a lawyer is a "criminal case." In the later case of *In Re Ruffalo*, 390 U.S. 544, (1968), this Court describes such proceedings as being of "a quasi-criminal nature" and admonishes that the requirements of due process be observed. However, we submit that, contrary to Petitioner's position, this cannot be construed as a holding by this Court that a disciplinary proceeding against a lawyer is a truly "criminal case" to which the Double Jeopardy Clause would be applicable.

Petitioner also cites *Zuckerman*, et al v. *Greason*, 386 U.S. 15 (1967), and *Kaye* v. *Coordinating Committee on Discipline of Association of the Bar of the City of New York*, 386 U.S. 17 (1967). Both of these cases involved the same issue presented in *Spevack*, and in both instances the Court rendered a *Per Curiam* decision remanding the cases for reconsideration in the light of *Spevack*. In *Ruffalo*, cited above by Petitioner, the Association of American Railroads had investigated Ruffalo's handling of claims against the B & O Railroad. The President of the Bar Association, who ordered the charges filed, was also local counsel for the B & O. The original charges included claims that Ruffalo solicited FELA clients through a man named Orlando, an employee of the B & O. Ruffalo testified that Orlando merely investigated FELA cases for him. After this testimony the Ohio Board of Bar Commissioners on Grievances then added a new charge against Ruffalo—that Ruffalo had countenanced and set in motion a scheme whereby Orlando investigated cases for Ruffalo against Orlando's own employer. Ruffalo's motion to strike the new charge was denied, and the disbarment decision was based solely on this latter charge. This procedure against Ruffalo was found by this Court not to comply with the requirements of due process.

In *Ex Parte Wall*, 107 U.S. 265 (1917) this Court held that disciplinary proceedings against lawyers are civil rather than criminal in nature, and we believe this Court has, in effect, affirmed this position in the recent case of *Ungar Ass'n of the Bar of the City of New York*, 389 U.S. 1007 (1967), which was presented to this Court subsequent to the opinion in *Spevack*. Ungar, an attorney and real estate operator in New York City, was convicted of criminal contempt. He had originally testified before a Grand Jury which had granted him immunity. The Grand Jury returned an indictment against Hulan Jack, and Ungar was called as a witness at Jack's trial. Ungar's conduct as a witness at the Jack trial was the basis for Ungar's conviction for criminal contempt.

A disciplinary action was subsequently instituted against Ungar predicated upon the criminal contempt conviction, for aiding and abetting a violation of the conflict of interest statute, and for attempted obstruction of justice. At the conclusion of the proceedings Ungar was disbarred (269 N.Y.S. 2d 163). He unsuccessfully sought to appeal to New York's highest Court (18 N.Y. 2d 690) then petitioned this Court for a Writ of Certiorari. The petition was denied (385 U.S. 1006), shortly before this Court decided *Spevack*.

Following the decision in *Spevack*, Ungar moved to vacate the order of disbarment upon the ground that *Spevack* stood for the proposition that the term "criminal case" as used in the Fifth Amendment to the Federal Constitution encompasses any governmental act which in any sense "punishes" or affects the individual adversely, including a disciplinary proceeding; that the testimony he had given before the Grand Jury had been compelled by a grant of immunity; and that since immunity must be co-extensive with the scope of the privilege, he had been, under his interpretation of *Spevack*, immunized from discipline for any conduct disclosed in his Grand Jury testimony. Conse-

quently, Ungar contended that he should not have been prosecuted for the charges predicated upon a violation of the conflict of interest statute and the attempted obstruction of justice, both of which were the subject of his Grand Jury testimony.

The Appellate Division, First Department, the New York Court having jurisdiction in disciplinary matters, denied Ungar's motion to vacate the order of disbarment, holding that a disciplinary proceeding was not a criminal case and that, consequently, the grant of immunity by the Grand Jury could not immunize him from discipline, (282 N.Y.S 2d 158). New York's highest court denied Ungar's motion for leave to appeal from the order denying his motion to vacate and he petitioned the Supreme Court of the United States for certiorari. The petition was denied on December 11, 1967, 389 U.S. 1007.

We respectfully submit to this Court the illusory nature of the Petitioner's argument. First, after urging the abandonment of "labels", Petitioner proceeds to "label" disciplinary proceedings as "penal", which he equates with "criminal". Having done this, Petitioner then contends that all of the constitutional privileges available to the defendant in a criminal proceeding should be available to a defendant or respondent in a proceeding labelled "penal", all without consideration to the social interest sought to be protected or the essential nature of the proceedings involved.

Second, Petitioner's argument, although superficially plausible, does not bear up under critical examination. By way of example, let us assume an Illinois police officer, under color of state authority, unlawfully invades the privacy of a citizen's home and abuses the citizen and his family. Such conduct could give rise to a disciplinary pro-

ceeding before a police board, a state criminal action or civil action for damages by the citizen, and a possible federal civil rights action. If the conduct were intentionally "fraudulent, malicious, wilful or wanton" the plaintiff in the civil actions would be entitled to exemplary or punitive damages as well as to compensatory damages. (*Eshelman* v. *Rawalt*, 298 Ill. 192, 131 N.E. 675, 16 A.L.R. 1311 (1921); *Aladdin Mfg. Co.* v. *Mantle Lamp Co. of America*, (7th Cir. 1941) 116 F. 2d 708.) All proceedings would be wholly, or to a degree, "penal". If prosecution of any one of the proceedings could be used as a bar to the remaining proceedings judicial chaos would follow and administrative proceedings would, for all practical purposes, have to be abandoned.

We conclude by a brief quotation from this Court's opinion in the case of *In re Isserman*, 345 U.S. 286 (1953) (page 289):

> "There is no vested right in an individual to practice law. Rather there is a right in the Court to protect itself, and hence society, as an instrument of justice."

CONCLUSION

It is submitted that Nathan Shavin's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Heretofore appearing as amicus curiae in the Supreme Court of Illinois for the Board of Managers and the Committee on Grievances of the Chicago Bar Association, Sitting as Commissioners of the Supreme Court of Illinois under Illinois Revised Statutes c. 110A § 751 (1967).

APPENDIX I

Illinois Revised Statutes, c. 110A § 751 (1967).

(a) The Board of Governors and its existing Committee on Grievances, and their successors as such, of the Illinois State Bar Association, and the Board of Managers and its existing Committee on Grievances, and their successors as such, of the Chicago Bar Association, are hereby appointed as Commissioners of the Supreme Court and are empowered and charged to make investigations from time to time, as may be necessary, concerning practices of attorneys at law which tend to defeat the administration of justice or to bring the courts and the legal profession into disrepute. To this end, these commissioners are further empowered and charged to receive, entertain, inquire into, and take proof concerning complaints against attorneys at law of this state, and may call to their assistance in such inquiries other members of the bar or bar associations of the state, may make all necessary rules and regulations concerning the conduct of such inquiries, and may themselves, or by such committees as they may designate, take the evidence of witnesses, as hereinafter provided.

(b) No complaint against an attorney at law shall be entertained unless it is signed by the person or persons aggrieved or by the president and secretary of a regularly organized bar association or by the chairman of a regularly appointed committee of the Chicago or Illinois State Bar Associations and unless it is sufficiently clear and specific in its charges as reasonably to inform said attorney at law of the acts of misconduct he is claimed to have committed.

(c) When a member of the bar, designated by the Board of Governors of the Illinois State Bar Association or the Board of Managers of the Chicago Bar Association so to

do, shall file in the office of the clerk of the Supreme Court an affidavit showing that any respondent resides or has gone out of this state or on due inquiry cannot be found, or is concealed within this state, so that process cannot be served upon him, and stating the place of residence of such respondent, if known, or that upon diligent inquiry his place of residence cannot be ascertained, and stating his last known place of residence, the clerk of the Supreme Court shall cause publication to be made in some newspaper of general circulation published in the county of respondent's place of residence or last known place of residence in this state, as set forth in such affidavit, containing notice of the pendency of the proceeding, the names of the complainant and the respondent, the title of this Court and that of the commissioners of the Court (the members of the Board of Governors and Committee on Grievances of the Illinois State Bar Association or of the Board of Managers and the Committee on Grievances of the Chicago Bar Association, as the case may be) and the time and place of the hearing of the case. He shall also within ten days from the first publication of such notice send a copy thereof by mail, addressed to such respondent whose residence or last known place of residence is stated in such affidavit. The certificate of the clerk that he has sent such copy in pursuance of this provision shall be evidence. Such notice shall be published for three consecutive weeks, the first insertion of which shall be at least thirty days before the date upon which the said cause shall be set for hearing by the commissioners; and unless said time has intervened no proceeding therein shall be had, but the said cause shall stand continued to a date at least thirty days after the said first date set for hearing, provided, that in case the respondent appears and consents to the hearing the cause may be heard at an earlier time.

(d) Upon application by such commissioners, or committees, the clerk of the Supreme Court shall issue writs of subpoena ad testificandum, writs of subpoena duces tecum, or dedimus potestatem to take depositions. The commissioners and their committees are empowered to take and transcribe the evidence of witnesses, who shall be sworn by a commissioner or any person authorized by law to administer oaths, and the commissioners shall report to the Supreme Court the failure or refusal of any person to attend and testify in response to any subpoena. The hearings before the commissioners or committees shall be private unless the respondent shall request that they be public.

(e) At the conclusion of a hearing upon any complaint against any attorney before such commissioners or committees, the Board of Governors or Board of Managers, as the case may be, shall, if action by the Supreme Court of any kind is recommended, make report to the Supreme Court of its conclusions of fact and law concerning the complaint, answer, and proof; and thereupon such matters shall stand for hearing and disposition in this Court. Such report shall be entered on the docket and entitled in the name of the respondent. Upon the filing of any such report with proof of service of a copy thereof on the respondent in the same manner as briefs are required by rule of the Supreme Court to be served, the respondent therein shall have ten days from the date of such filing to file exceptions thereto, and shall, within twenty days after the filing of such exceptions, bring to the Supreme Court the record and proofs, or such parts thereof as may be necessary to enable the Court to pass upon such exceptions. The commissioners, upon request of the respondent and payment of the actual cost thereof, shall certify to the Court the proofs and record, or such parts thereof as the respondent may designate. With such record the respondent shall file a printed brief

and designation of excerpt from record or an abstract as provided in rules 341, 342, and 344.

(f) Upon the filing of exceptions to such report by the respondent, the Board of Governors or the Board of Managers, as the case may be, shall designate a member of the bar to file such certificates of proof, additional designation of excerpts or additional abstract, and brief as may be deemed necessary fully to advise the Court. Such additional designation or additional abstract, if any, and brief shall be filed within twenty days after the filing of the respondent's designation or abstract and brief, and respondent may file a reply brief and excerpts from record in 10 days. The number of excerpts or abstracts and briefs and the manner of their duplication and service shall be governed by rule 344.